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ZENTOR (M) SDN BHD

v.

MUNIANDY SENGGAMALAY

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: MT1-12-61-2003]
23 OCTOBER 2008

C ***CIVIL PROCEDURE:*** *Appeal - Claim for monies owing - Appeal against decision of sessions court allowing plaintiff's claim for RM29,402.10 - Whether trial judge had not recorded material facts in notes of proceedings - Whether trial judge embarked on a careful and objective judicial appreciation of evidence adduced - Whether there was* D *any appealable error to justify appellate interference - Subordinate Courts Rules 1980, O. 28 rr. 1, 12, 13*

CIVIL PROCEDURE: *Appeal - Appeal record - Subordinate Courts Rules 1980, O. 28 rr. 1, 12, 13 - Whether trial judge had not recorded* E *material facts in notes of proceedings - Additional evidence - Inclusion of - Failure to obtain leave of court - Whether inclusion of additional evidence highly improper and legally unsustainable - Whether trial judge embarked on a careful and objective judicial appreciation of evidence adduced - Whether there was any appealable error to justify appellate* F *interference*

The defendant was a housing developer ('the developer') while the plaintiff was the registered owner of the land ('landowner') held under Geran Mukim No. GM 163, Lot No. 2607, in the Mukim of Bukit Lintang, district of Melaka Tengah ('the land'). The G developer and the landowner entered into a joint venture agreement (JVA) to develop the land into 29 houses, out of which the landowner was entitled to six. The land was charged to a bank as security for a loan in the sum of RM175,000 to them and they had to repay the loan equally *ie*, RM87,500 respectively. As H the landowner did not pay the development expenses of RM193,465, the developer had sold the house erected on Lot 782, which was one of the six houses to which the landowner was entitled, for RM222,897. After deducting the development expenses, there was an excess of RM29,402.10 due and owing to I the landowner. That was the subject matter of the landowner's claim against the developer in the sessions court. On the other

hand, the developer had included a counterclaim against the landowner to recover the 'shortfall' of RM29,970.75. On 2 December 2003, the sessions court judge ('the trial judge') allowed the plaintiff's claim in the sum of RM29,402.10 against the defendant; dismissed the defendant's counterclaim and awarded to the plaintiff costs. This was the defendant's appeal against the aforesaid orders. It was submitted by the defendant that the trial judge had not recorded material facts in his notes of proceedings and that the omissions amounted to fundamental misdirection on the part of the trial judge, and so warranted appellate intervention.

Held (dismissing the appeal with costs):

(1) The proceedings at the trial had been heard in open court: O. 28 r. 1 of the Subordinate Courts Rules 1980. Order 28 rr. 12 and 13 provides respectively for the recording of the notes of evidence and the demeanour of the witnesses. The trial judge herein had recorded and transcribed at pp. 41 to 48 of the appeal record setting out eight pages of the evidence of the witnesses as the correct and accurate version. Section 80 of the Evidence Act 1950 provides for the presumption as to documents produced as record of evidence. (paras 10 & 12)

(2) The additional evidence which the developer sought to include in the appeal record could only be included with leave of the court hearing the appeal. In order to include the counsel's affidavit as additional evidence, it was essential for him to file a notice of motion to apply for leave from the appellate court. That notice of motion must be supported by an affidavit setting out the grounds for the inclusion of the additional evidence. The landowner has to be given the opportunity of hearing on whether there was consent or objection to that application. However, the developer had not done so. What the developer's counsel did was to unilaterally include the additional evidence in the pious hope that it formed part and parcel of the appeal record so that the court would in any event treat it as such. That certainly ran counter to the rules of natural justice as the landowner was deprived of the opportunity to have his day in court and present his views on the inclusion or exclusion of the additional evidence. The inclusion of the additional evidence was highly improper and was legally unsustainable. It was hereby rejected from the appeal record. (para 14)

(3) With the rejection of the developer's own version of what transpired in the court room and of the evidence of the witnesses who testified at the trial, this court need only consider the evidence recorded by the trial judge. Upon a proper perusal of the appeal record, the trial judge had embarked on a careful and objective judicial appreciation of the evidence adduced before him. He had thereafter arrived at a finding of facts which formed the basis of his judgment. This court was unable to identify any appealable error to justify appellate interference. (para 21)

[Order accordingly.]

Case(s) referred to:
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 SC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 80
Subordinate Courts Rules 1980, O. 28 rr. 1, 12, 13

For the appellant - Nizam Bashir; M/s Bashir, Wong, Chin & Partners
For the respondent - Anis Hasliza; M/s Hafidz & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

[1] On 2 December 2003, the learned sessions court judge ("the trial judge") allowed the plaintiff's claim in the sum of RM29,402.10 against the defendant; dismissed the defendant's counterclaim; and awarded to the plaintiff costs, including the costs in amending the defendant's defence and counterclaim. This is the defendant's appeal against the aforesaid orders.

Finding Of Facts

[2] After a full trial, the trial judge's finding of facts may be narrated below.

[3] The defendant was a housing developer ("the developer"), while the plaintiff was the registered owner of the land ("landowner") held under Geran Mukim No. GM 163, Lot No. 2607, in the mukim of Bukit Lintang, district of Melaka Tengah ("the land").

[4] On 25 September 1995, the developer and the landowner entered into a joint venture agreement (JVA) to develop the land into 29 houses, out of which the landowner was entitled to six. The landowner admitted that he had to pay a sum of RM193,495 towards the expenses for the development of the land. The land was charged to a bank as security for a loan in the sum of RM175,000 to them. They have to repay the loan equally ie, RM87,500 respectively.

[5] As the landowner did not pay the development expenses of RM193,495 the developer had sold the house erected on Lot 782 for RM222,897. Lot 782 was one of the six houses to which the landowner was entitled. After deducting the development expenses of RM193,495 there was an excess of RM29,402.10 due and owing to the landowner. That was the subject matter of the landowner's claim against the developer in the sessions court.

[6] On the other hand, the developer has included a counterclaim against the landowner to recover the "shortfall" of RM29.970.75.

Notes Of Proceedings

[7] The thrust of the submission of learned counsel Mr. Nizam Bashir for the developer rests on his allegation that the trial judge had not recorded material facts in his notes of proceedings. Counsel referred to his own affidavit which he affirmed on 24 March 2004 ie, three months and 22 days after the decision has been delivered by the trial judge on 2 December 2003. In his affidavit, he averred that there were inaccuracies and omissions in the trial judge's notes of proceedings. He annexed his own version of the evidence as exhibit at pp. 49 D to L of the appeal record which, he said, had been adduced at the trial but was not recorded or was recorded inaccurately. He added that the inaccuracies and omissions amounted to fundamental misdirection on the part of the trial judge, and so warranted appellate intervention.

[8] His learned friend Miss Anis Hasliza acting for the landowner argued that the notes of proceedings recorded by the trial judge are free from inaccuracies or omissions.

[9] In my judgment, I must stress that this kind of allegation is exceptionally rare, especially where this issue is raised several months after the decision of the trial judge had been delivered. Since the allegation was made by counsel for the developer as the defeated party, it certainly deserves even more careful consideration here. Hence, in all fairness to the parties and also to the trial judge, it is imperative that I give a definitive ruling in this regard.

[10] It must be placed on record immediately that the proceedings at the trial had been heard in open court : O. 28 r. 1 of the Subordinate Courts Rules 1980. O. 28 rr. 12 and 13, which provide respectively for the recording of the notes of evidence and the demeanour of the witnesses, read as follows:

> Notes of evidence. (O. 28 r. 12).
>
> 12. The Court shall take a note of the evidence, stating the terms of any particular question or answer if there appears to be any special reason for doing so, and shall make a note of the judgment given or order made in any action and shall sign or initial the same.
>
> Remarks on demeanour of witness. (O. 28 r. 13).
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> 13. The Court may record on the notes of evidence such remarks as it thinks material respecting the demeanour of any witness while under examination.

[11] The developer's allegation that pp. 49 D to L of the appeal record containing nine pages of evidence had been adduced for the parties herein but had not recorded or had been recorded inaccurately would suggest that the trial judge had been hearing the witnesses and had not been recording the evidence at all or had intentionally recorded it inaccurately.

[12] With respect, I am unable to accept the allegation levelled at the trial judge who is very senior in service. Instead, I accept the version of the evidence that the trial judge had recorded and now transcribed at pp. 41 to 48 of the appeal record setting out eight pages of the evidence of the witnesses as the correct and

accurate version. Section 80 of the Evidence Act 1950 provides for the presumption as to documents produced as record of evidence. The relevant portion merits reproduction as follows:

> Presumption as to documents produced as record of evidence.
>
> 80. Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding ... taken in accordance with law and purporting to be signed by any ... Sessions Court Judge, the court shall presume that:
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> (a) the document is genuine;
>
> (b) ...; and
>
> (c) such evidence, ... was duly taken.

[13] Section 80 was applied by Wan Yahya J in *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606 HC Melaka which was cited for the developer herein. The facts there showed that contrary to the notes of evidence as recorded by the learned president of the sessions court, newspaper cuttings *inter alia* showed that what the learned counsel allegedly said in court was that his client "had been led into believing that the deputy public prosecutor would not be pressing for deterrent sentence and the court would be persuaded into giving a lenient sentence". Counsel relied on the newspaper report to press home the point that, had it not been for what the learned deputy had said, he would not have advised the appellant to enter a guilty plea to the charge. On this issue, his Lordship held as follows:

> [1] Newspaper reports of Court cases are by no means abolutely accurate verbatim reports of what actually transpired in the Court room. Counsel should realise that it will require more than newspaper cuttings to discredit the written words of a trial president.
>
> [2] By s. 80 of the Evidence Act, it is presumed that the records of evidence in judicial proceedings were legally and correctly done. Counsel may rebut this presumption by the introduction of proper contrary additional evidence, such as the introduction of affidavit by himself or the Court's staff, or perhaps the newspaper reporters concerned. This was not done.

[14] Reverting to the mainstream of the instant appeal, it is to be noted that the additional evidence which the developer sought to include in the appeal record can only be included with leave of the court hearing the appeal. In order to include the counsel's affidavit as additional evidence, it is essential for him to file a notice of motion to apply for leave from the appellate court. That notice of motion must be supported by an affidavit setting out the grounds for the inclusion of the additional evidence. The landowner has to be given the opportunity of hearing on whether there was consent or objection to that application. However, the developer has not done so. What the developer's counsel did was to unilaterally include the additional evidence in the pious hope that it forms part and parcel of the appeal record so that the court would in any event treat it as such. That in my view certainly runs counter to the rules of natural justice as the landowner is deprived of the opportunity to have his day in court and present his views on the inclusion or exclusion of the additional evidence. I find the inclusion of the additional evidence highly improper and is legally unsustainable. It is hereby rejected from the appeal record.

[15] In *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19 SC, on which the developer herein relied, one of the issues concerns the tenanted area ie, whether it was 9,000 sq ft or three acres. Edgar Joseph Jr SCJ (as he then was) speaking for the Supreme Court found that the notes of proceedings recorded by Mustapha Hussain J was incomplete. After careful consideration, the Supreme Court found that the area in question was 2.8 acres or approximately 121,619 sq ft. The relevant *ratio* there relates to the finding of facts rather than the inclusion or exclusion of additional evidence to establish the alleged inaccuracies or omissions.

[16] I am unable to find any part of the Supreme Court judgment which is helpful to the developer herein.

[17] Be that as it may, I shall consider the merits of the defendant's appeal.

Merits Of Appeal

[18] In contending for the developer that the trial judge erred in giving judgment for the landowner and in dismissing the defendant's counterclaim, the developer reverted to the counsel's

affidavit and treated the aforesaid pages therein as additional evidence to disprove the plaintiff's claim and to establish the counterclaim.

[19] The plaintiff's response is that the plaintiff has proved its claim and that the defendant has failed to establish its counterclaim.

[20] The trial judge found as a fact that:

(1) the plaintiff has established his claim for RM29,402.10 against the defendant by deducting the sum of RM193,495 from the proceeds of sale ie, RM222,897.10; and

(2) there is no evidence to substantiate the defendant's counterclaim.

[21] In my judgment, with the rejection of the developer's own version of what transpired in the court room and of the evidence of the witnesses who testified at the trial, I need only consider the evidence recorded by the trial judge. Upon a proper perusal of the appeal record, I find that the trial judge had embarked on a careful and objective judicial appreciation of the evidence adduced before him. He has thereafter arrived at a finding of facts which forms the basis of his judgment. I am unable to identify any appealable error to justify appellate interference.

Conclusion

[22] On the foregoing grounds, I hold that this appeal is without merits and is hereby dismissed with costs. I therefore affirm the aforesaid orders of the trial judge.

[23] Counsel for the landowner applied for the release of the judgment sum which the developer has deposited with the developer's solicitors for the purpose of satisfying the said judgment sum, together with all interest accrued thereon. The developer has raised no objection. I now make an order that the said deposit sum together with all interest accrued thereon be released to the landowner in satisfaction of the judgment sum and the interest accrued. Thereafter, the landowner is at liberty to effect execution on the balance thereof, if any.